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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

MOHAMED BARKATLE,		
Petitioner,	:	STATE'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PETITION FOR POST CONVICTION RELIEF
vs.	:	
STATE OF UTAH,	:	
Respondent.	:	Case No. 120905167
	:	Judge Randall N. Skanchy

Respondent State of Utah, by and through its attorney, Erin Riley, Assistant Attorney General, submits the following memorandum in support of its motion to dismiss the petition for post-conviction relief.

RELEVANT CASE HISTORY

According to the information stated in his petition for post-conviction relief, On April 19, 2004, in Third District Court case no. 031907876, Petitioner Barkatle pled guilty to two counts of Theft, both 3rd degree felonies. He was sentenced to 365 days in jail, but the jail time was suspended (Pet. at 1). Both counts were subsequently reduced to class A misdemeanors. *Id*. The convictions were later expunged (Pet.'s memo. at 2).

More than eight (8) years after his conviction, on July 30, 2012, Petitioner filed a petition for post-conviction relief. On August 8, 2012, this Court entered an order requesting a response from the State. However, the case was then stayed pending the decision of the United States Supreme Court in *Chaidez v. United States.* The *Chaidez* decision was entered on February 20, 2013. *Chaidez v. United States*, 2013 WL 610201 (addendum A).

SUMMARY OF ARGUMENT

Petitioner Barkatle alleges that he is entitled to post-conviction relief based on his claim of ineffective assistance of counsel because he asserts that his counsel did not advise him of the immigration consequences of his plea, and *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010) requires that counsel inform a client whether his plea carries a risk of deportation. But Petitioner's case became final in 2004, and the Supreme Court has held that "defendants whose convictions became final prior to *Padilla* [] cannot benefit from its holding." *Chaidez*, 2013 WL 610201 at *10.

ARGUMENT

I. THE PETITION SHOULD BE DENIED AND DISMISSED AS UNTIMELY BECAUSE *PADILLA* DOES NOT APPLY.

In his petition for post-conviction relief, Petitioner asserts that he is entitled to post-conviction relief because he received ineffective assistance of counsel. Petitioner alleges that his counsel was ineffective because he failed to advise Petitioner of the immigration consequences of his guilty plea.[1]

Petitioner bases his claim of ineffective assistance of counsel on the case of *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). However, the *Padilla* decision was not entered until March 31, 2010, many years after Petitioner's conviction became final in 2004. The United States Supreme Court has recently held that it "announced a new rule in *Padilla." Chaidez*, 2013 WL 610201 at *10. And "[u]nder *Teague*, defendants whose convictions became final prior to *Padilla* therefore cannot benefit from its holding." *Id*.

A. The petition was filed long past the Post-Conviction Remedies Act's one year statute of limitations.

Under Utah's Post-Conviction Remedies Act (PCRA), a "petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued." Utah Code Ann. § 78B-9-107(1) (West 2010). In relevant part, the PCRA provides that a cause of

[1] The State does not concede that this is true, but merely assumes for purposes of this motion to dismiss that counsel did not advise Petitioner of the immigration consequences of his plea.

action accrues on the latest of the following dates:

> (a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;
>
> * * *
>
> (f) the date on which the new rule described in Subsection 78B-9-104(1)(f) is established.

Utah Code Ann. § 78B-9-107(2).

1. The petition is untimely because it was not filed within one year of the last day for filing an appeal.

Petitioner did not file any direct appeal. Therefore, his cause of action accrued on "the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken." Utah Code Ann. § 78B-9-107(2)(a).

According to the facts set out in his petition, Barkatle was convicted and sentenced on April 19, 2004. After a criminal conviction, an appeal "shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment." Utah R. App. P. 4(a). Petitioner therefore had until May 19, 2004 to file a notice of appeal. Because he did not file any appeal, his post-conviction cause of action accrued on May 19, 2004. He then had one year to file a timely post-conviction petition. Petitioner did not file his post-conviction petition until July 30, 2012. His petition is over seven (7) years too late.

2. Petitioner's cause of action did not accrue when the *Padilla* decision was released, because the *Padilla* rule does not meet the requirements of § 78B-9-104(1)(f).

Under the PCRA's section 78B-9-107(2)(f), a cause of action may also accrue on the date on which a new rule, as described in subsection 78B-9-104(1)(f) is established. Subsection 104 states that a petitioner may file an action for post-conviction relief if he can meet the following conditions:

> (f) petitioner can prove entitlement to relief under a rule announced by the United States Supreme Court, the Utah Supreme Court, or the Utah Court of Appeals after conviction and sentence became final on direct appeal, and that:
>
> (i) the rule was dictated by precedent existing at the time the petitioner's conviction or sentence became final; . . .

78B-9-104(f)(i).

In *Padilla*, the United States Supreme Court announced a new rule. *Chaidez*, 2013 WL 610201 at *5 and *10. The rule was not dictated by precedent existing at the time Petitioner's conviction became final. Under *Padilla*, when "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequences," defense counsel performs deficiently by not informing a client that his plea carries a risk of deportation. 130 S.Ct. at 1478 & 1487.

Petitioner cannot prove entitlement to relief under *Padilla* because the Supreme Court has specifically held that "defendants whose convictions became final prior to *Padilla* [] cannot benefit from its holding." *Chaidez,* 2013 WL 610201 at *10 (addendum A). In

addition, *Padilla's* new rule was not dictated by precedent existing at the time Petitioner's conviction or sentence became final. *Id. at *7.* The new *Padilla* rule therefore does not meet the PCRA requirements for accrual of a cause of action as described in section 104.

Because Petitioner cannot meet the requirements of § 78B-9-104(1)(f), his cause of action did not accrue when the new rule was announced in *Padilla*. His cause of action accrued on the last day for filing an appeal. Because Petitioner's conviction became final prior to *Padilla*, he cannot benefit from its holding. Petitioner's cause of action did not accrue on the date the new rule was announced in *Padilla*. His petition is therefore untimely and should be denied and dismissed.

B. Petitioner has not alleged any reason for the one-year statute of limitations to be tolled.

The PCRA's one-year time limit is tolled for any period during which a petitioner "was prevented from filing a petition due to state action in violation of the United States Constitution, or due to physical or mental incapacity." Utah Code Ann. § 78B-9-107(3). Petitioner has not asserted that the one-year time limit should be tolled.

C. Petitioner bears the burden of proof.

Under the PCRA, "[]the petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." Utah Code Ann. § 78B-9-105(1). That burden includes proving that his claims are not time-barred. The respondent has the burden of pleading any ground of preclusion, such as a time-

bar, "but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence." Utah Code Ann. § 78B-9-105(2).

II. EVEN IF THE PETITION WERE NOT TIME-BARRED, PETITIONER WOULD NOT BE ENTITLED TO POST-CONVICTION RELIEF BECAUSE HE CANNOT ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.

Under the PCRA, a cause of action may also accrue on

> (e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based

Utah Code Ann. §78B-9-107(2)(e).

Petitioner asserts that he "first became aware of the fact that he was subjected to deficient counsel around April of 2012, when he inquired into eligibility to become a naturalized citizen of the United States." (Pet.'s memo at 2).

The evidentiary facts on which the petition is based are that Petitioner entered a guilty plea, his counsel did not advise him of the deportation consequences of that guilty plea, and in 2010, *Padilla* held that defense counsel have an obligation to advise their clients of the clear deportation consequences of their plea. Petitioner knew that he was not a U.S. citizen. He knew that he had entered a guilty plea. He knew that his counsel had not advised him of the immigration consequences of his guilty plea. When the *Padilla* case was entered in March of 2010, in the exercise of reasonable diligence, Petitioner knew or should have known all of the evidentiary facts on which his petition is based. Therefore his cause of

action accrued in March of 2010 and he had one year, until March of 2011 to file a timely petition. But the petition was not filed until August of 2012. The petition is therefore untimely.

Nevertheless, even if this court determines that the cause of action did not accrue until April 2012, and that the petition is therefore timely, Petitioner is still not entitled to relief because *Padilla* does not apply and Petitioner therefore cannot establish that he received ineffective assistance of counsel.

A. *Strickland* applies to collateral challenges to guilty pleas based on claims of ineffective assistance of counsel.

The PCRA permits post-conviction relief for ineffective assistance of counsel. Utah Code Ann. § 78B-9-104(1)(d). "[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366 (1985). To be entitled to post-conviction relief on a claim of ineffective assistance of counsel, a petitioner must establish not only that his counsel's performance was deficient, but also that he was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 693, 104 S.Ct. 2052 (1984). Therefore, in order to be entitled to post-conviction relief, petitioner must establish that his counsel's performance was objectively unreasonable and that but for his counsel's behavior, he would not have pled guilty.

Before *Padilla*, in interpreting the *Strickland* standard for ineffective assistance of counsel, Utah determined that counsel was not required to inform a defendant of the

immigration consequences of a guilty plea. *State v. McFadden*, 884 P.2d 1303, 1305 (Utah App. 1994) *cert. denied*, 892 P.2d 13 (Utah 1995). Before the 2010 decision in *Padilla*, state and lower federal courts "almost unanimously concluded that the Sixth Amendment does not require attorneys to inform their clients of a conviction's collateral consequences, including deportation." *Chaidez*, 2013 WL 610201 at *6.

B. Petitioner cannot establish that his counsel performed deficiently.

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688, *and see Kell v. State*, 2008 UT 62, ¶28, 194 P.3d 913; *Allen v. Friel*, 2008 UT 56, ¶ 21, 194 P.3d 903. When considering whether counsel performed deficiently, a court must assess counsel's decisions from counsel's "perspective at the time." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). Petitioner had to meet that burden based on the standards of practice in Utah when he entered his guilty plea in 2004, based on the facts and the law available to counsel at that time. *See Wiggins*, 539 U.S. at 524 (assessing counsel's performance against Maryland practice standards at the time of trial);and *State v. Dunn*, 850 P.2d 1201, 1228 (Utah 1993)("a defendant bears the burden of demonstrating why, on the basis of law in effect at the time of trial, his or her trial counsel's performance was deficient").

Petitioner cannot establish that his counsel behaved unreasonably or performed deficiently under the prevailing professional norms in Utah at the time of his conviction.

When Petitioner entered his plea, a defendant needed to be "fully aware of the direct consequences" of his guilty plea. *Brady v. United States*, 397 U.S. 742, 755 (1970). However, under Utah law in effect at the time, "counsel's performance [was] not deficient by the mere failure to apprise a noncitizen defendant that entry of a guilty plea might subject defendant to deportation." *State v. McFadden*, 884 P.2d 1303, 1305 (Utah App. 1994) *cert. denied*, 892 P.2d 13 (Utah 1995). In addition, the voluntariness of a plea was considered to be unaffected by collateral consequences such as possible deportation. *Id*.

Before *Padilla*, Utah law clearly held that defense counsel had no affirmative duty to advise defendants of potential adverse immigration consequences of a guilty plea. *See State v. Rojas-Martinez*, 2005 UT 86, ¶ 20, 125 P.3d 930; *McFadden*, 884 P.2d at 1305. The underlying rationale for this rule was that deportation was a collateral consequence of a guilty plea and counsel's failure to advise a client of collateral consequences could not be deemed to be ineffective assistance of counsel.[2] *Id.*

When Petitioner entered his guilty plea, under the prevailing professional norms in Utah, defense counsel had no duty to advise a noncitizen client of the immigration consequences of a plea; counsel's only duty in that regard was to not affirmatively misadvise.

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[2] While Utah law did not require defense counsel to advise their clients of adverse immigration consequences, it prohibited counsel from affirmatively misrepresenting those consequences. *Rojas-Martinez*, 2005 UT 86 at ¶¶ 20-21. In other words, defense counsel did not perform deficiently by remaining silent regarding the deportation consequences of a plea, but if he or she chose to advise the client, that advice had to be correct.

Petitioner therefore cannot establish that his counsel performed deficiently by failing to advise him of the immigration consequences of his plea.

C. Petitioner has failed to establish prejudice.

Because Petitioner cannot meet the deficiency prong of the *Strickland* test, there is no need to even discuss the prejudice prong. However, Petitioner has also failed to meet the prejudice prong of the *Strickland* test. When asserting a claim of ineffective assistance of counsel, a petitioner must establish not only that his counsel's performance was deficient, but also that he was prejudiced. *Strickland*, 466 U.S. at 693**.**

Under the *Padilla* rule, when "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequences," defense counsel performs deficiently by not informing a client that his plea carries a risk of deportation. However, even when counsel fails to follow the *Padilla* rule, counsel is not constitutionally ineffective unless that failure actually prejudices the defendant. Whether a petitioner would be entitled to relief "depends on whether he has been prejudiced," a matter that the *Padilla* court did not address. *Padilla*, 130 S.Ct. 1478 & 1487.

In the guilty plea context, prejudice is proven if the defendant shows that, but for counsel's error, he would not have pled guilty. "[I]n order to satisfy the 'prejudice' requirement, [Petitioner] must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."

Hill, 474 U.S. at 59; *see also Moench v. State*, 2004 UT App 57, ¶21; 88 P.3d 353*; Parsons v. Barnes*, 871 P.2d 516, 525 (Utah 1994); *and Miller v. Champion*, 262 F.3d 1066, 1072 (10th Cir. 2001).

A petitioner's assertion that he would not have pled guilty is not sufficient to establish prejudice. "[M]ere allegation that he would have insisted on trial but for his trial counsel's errors, although necessary, is ultimately insufficient to entitle him to relief. Rather, we look to the factual circumstances surrounding the plea to determine whether [he] would have proceeded to trial." *United States v. Clingman*, 288 F.3d 1183, 1186 (10th Cir. 2002) (citation omitted). "[C]ourts applying this standard will often review the strength of the prosecutor's case as the best evidence of whether a defendant in fact would have changed his plea and insisted on going to trial." *Miller*, 262 F.3d at 1072. "It is not necessary for the defendant to show that he actually would have prevailed at trial, although the strength of the government's case against the defendant should be considered in evaluating whether the defendant really would have gone to trial if he had received adequate advice from his counsel." *Miller*, 262 F.3d at 1069.

The determination as to whether a petitioner has met the prejudice prong must include consideration of all of the facts and circumstances of the case. This includes information such as whether Petitioner confessed or gave a statement to the police, the strength of the State's case, whether the plea offer was to a reduced charge, whether other charges were

dismissed, and the likelihood of conviction on the greater charge or additional charges if petitioner had gone to trial. Petitioner bears the burden of proof, (Utah Code Ann. §78B-9-105), but Petitioner has failed to even address any of these facts or circumstances.

As *Padilla* recognizes, "[s]urmounting *Strickland's* high bar is never an easy task" and it is particularly difficult with this type of claim because "petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 130 S.Ct. at 1485. Petitioner has not attempted to meet that standard. He therefore has not met the *Strickland* prejudice requirement and cannot establish ineffective assistance of counsel.

III. PETITIONER IS NOT ENTITLED TO POST-CONVICTION RELIEF BECAUSE HE HAS FAILED TO ESTABLISH THAT HIS PLEA WAS NOT KNOWING AND VOLUNTARY.

In addition to arguing that he received ineffective assistance of counsel, Petitioner also claims that his plea was not knowing and voluntary (pet.'s memo. at 3). As addressed above, this claim should be denied and dismissed because it is untimely. However, even if not untimely, Petitioner would not be entitled to relief. Petitioner claims that his plea was not knowing and voluntary because he did not know that pleading guilty could result in his deportation, and had he been aware of those consequences, he would not have pled guilty. *Id*. Petitioner asserts that *Padilla* holds that failure to properly inform a defendant of the immigration consequences of a guilty plea means that the defendant could not knowingly and

voluntarily enter a guilty plea.

First, as addressed above, *Padilla* does not apply to Petitioner's conviction. Second, Petitioner misinterprets the *Padilla* holding. *Padilla* only addresses ineffective assistance of counsel. It nowhere states that failure to advise about immigration consequences makes a claim not knowing and voluntary.

Finally, by claiming that his plea was rendered unknowing and involuntary because his counsel failed to warn him of the immigration consequences of his guilty plea, Petitioner is essentially claiming that his plea violated his right to due process. In *McFadden*, however, the Utah Court of Appeals rejected this very claim in the due process context. *See generally McFadden*, 884 P.2d at 1304-05. Specifically, the court of appeals noted that due process only requires that "an accused must be 'fully aware of the direct consequences of a guilty plea.'" *Id.* at 1304 (quoting *Brady v. United States*, 397 U.S. 742, 755 (1970)). The court further held that if a particular "consequence flowing from the plea is 'collateral,' then the defendant need not be informed of it before entering the plea." *Id.* (citation omitted). After noting that federal courts had "uniformly" concluded that deportation is a collateral consequence for purposes of due process, the court held that "the voluntariness of a plea is unaffected by collateral consequences such as possible deportation." *Id.*

The rule set forth by the United States Supreme Court in *Brady* and adopted by the Utah Court of Appeals in *McFadden*, was reaffirmed by the court of appeals in *State v.*

Marshall, 2003 UT App 381, ¶ 21 n.9, 81 P.3d 775. There, the court held that: "For a plea to be knowing and voluntary, an accused must be fully aware of the *direct* consequences of a guilty plea. . . . However, [i]f the consequence flowing from the plea is 'collateral,' then the defendant need not be informed of it before entering the plea." *Id.*

Padilla did not change this. *Padilla* only addressed defense counsel's obligations under the Sixth Amendment. But it said nothing at all about a court's obligation or the State's obligations under due process, and *Padilla* never purported to issue a ruling regarding a defendant's due process rights.

Other courts have recognized this in the post-*Padilla* context. In *United States v. Delgado-Ramos*, 635 F.3d 1237, 1237 (9th Cir. 2011), the Ninth Circuit reiterated that "a court conducting a plea colloquy must advise the defendant of the direct consequences of his plea, but need not advise him of all the possible collateral consequences of the plea." The Ninth Circuit specifically rejected the argument made by Petitioner here, noting that while *Padilla* governs in the ineffective assistance context, the decision "sheds no light on the obligations a district court may have under . . . due process." *Id.* Thus, even with *Padilla*, the Ninth Circuit continued to apply its earlier case law stating that a failure to inform a person of the immigration consequences of their plea was not a violation of due process. *See id*.

In *Smith v. State*, 697 S.E.2d 177, 184 (2010), the Georgia Supreme Court reached the same conclusion, rejecting the idea that *Padilla*'s language regarding ineffective assistance

of counsel claims also extends to due process:

> In short, despite its discussion of the importance of deportation risks to some defendants, in the end the Supreme Court did *not* extend the direct consequences doctrine to that issue, or reject the basic distinction between direct and collateral consequences in determining whether a defendant's guilty plea was knowingly and voluntarily entered. In the absence of such a binding directive to do so, we decline to do so either.

Id. at 184. Thus, while deportation is "intimately related to the criminal process," the possibility of deportation is still collateral for purposes of due process because it "remains a consequence beyond the authority of the sentencing court, and . . . does not lengthen or alter the sentence that the state court imposes." *Id.*

In short, controlling law from the United States Supreme Court and Utah's appellate courts rejects the very claim Petitioner is now making, instead holding that due process is not violated when a defendant is not informed of the immigration consequences prior to a plea. Those cases have not been overturned and are therefore binding on this Court. Petitioner's due process claim that his plea was not knowing and voluntary fails as a matter of law and must be dismissed.

CONCLUSION

Because *Padilla* does not apply to his conviction, this petition should be denied and dismissed because it is untimely. In the alternative, even if not untimely, Petitioner is still not entitled to relief. Since *Padilla* does not apply to his conviction, Petitioner cannot establish that he received ineffective assistance of counsel. In addition, even if the *Padilla*

rule applied, it only addresses claims of ineffective assistance of counsel. It does not address due process assertions related to whether a plea was knowing and voluntary.

Petitioner entered a guilty plea and was sentenced in 2004. His conviction therefore became final in 2004. Petitioner asserts that he is entitled to relief under *Padilla* because his counsel did not advise him of the immigration consequences of his plea. But in *Chaidez*, the Supreme Court held that "defendants whose convictions became final prior to *Padilla* [] cannot benefit from its holding." Because *Padilla* does not apply to Petitioner's conviction he cannot establish that he is entitled to relief. Therefore, this petition for post-conviction relief should be denied and dismissed.

DATED this _____ day of March, 2013.

JOHN E. SWALLOW
UTAH ATTORNEY GENERAL

_____
Erin Riley
Assistant Attorney General
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of March, 2013, I served a copy of the foregoing STATE'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PETITION FOR POST CONVICTION RELIEF, by causing the same to be mailed, via first class mail, postage prepaid, to the following:

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